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SIMMONS BEDDING COMPANY
and Defendant and Counterclaimant DREAMWELL, LTD.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ZINUS, INC. a California Corporation,

Plaintiff,

v.

SIMMONS BEDDING COMPANY, a
Delaware corporation, and DREAMWELL,
LTD., a limited liability company of
Nevada,

Defendants.

Case No. 07-CV-03012-PVT

**DECLARATION OF KENNETH B. WILSON
IN OPPOSITION TO ZINUS' MOTION FOR
SUMMARY JUDGMENT OF NO DIRECT
INFRINGEMENT**

Date: March 4, 2008
Time: 10:00 a.m.
Before: The Honorable Patricia V. Trumbull
Location: Courtroom 5

AND RELATED COUNTERCLAIMS

I, Kenneth B. Wilson, declare:

1. I am an attorney with the law firm of Perkins Coie LLP, counsel of record for defendant and counterclaimant Dreamwell, Ltd. ("Dreamwell"). I have personal knowledge of the facts set forth in this Declaration and can testify competently to those facts.

2. Attached to this Declaration as Exhibit 1 is a true and correct copy of U.S. Patent No. RE 36,142 (the "'142 Patent").

1 3. Attached to this Declaration as Exhibit 2 is a true and correct copy of selected
2 pages from the transcript of the deposition of Scott Reeves, which was taken in this action on
3 February 11, 2008.

4 4. Attached to this Declaration as Exhibit 3 is a true and correct copy of a document
5 produced in discovery by plaintiff and counterclaim defendant Zinus, Inc. ("Zinus"), bearing
6 Bates No. P 002247, as well as a printout of a translation of this document from Google
7 Translate.

8 5. Attached to this Declaration as Exhibit 4 is a true and correct copy of printouts I
9 made of pages from the walmart.com Web site on January 23, 2008.

10 6. Within the past couple of months, I had seen on the walmart.com Web site, as well
11 as at other locations on the Internet, a copy of a video produced by or on behalf of Zinus which
12 showed the process of unpackaging and expanding the Zinus innerspring Mattress-in-a-Box
13 product. However, when I searched again for this video over the past few weeks, I was unable to
14 locate it at any of the Web sites where I had previously seen it.

15 7. Attached to this Declaration as Exhibit 5 is a true and correct copy of the
16 American Heritage Dictionary definition of the word "gradual."

17 8. The Complaint in this action was filed on June 11, 2007. The Third Amended
18 Complaint, which is the operative version of the Complaint, was filed in this action on January 7,
19 2008, or little more than one month ago, and Dreamwell's Answer and Counterclaims was filed
20 on January 8, 2008.

21 9. On September 11, 2007, Zinus served its Initial Disclosures in this action.
22 Although Zinus identified several categories of documents in that document, it did not actually
23 produce any documents with the Disclosures.

24 10. On October 2, 2007, Zinus filed its first Motion for Summary Adjudication of
25 Non-Infringement. As of that date, Zinus still had not produced any documents. Dreamwell
26 advised Zinus that it needed certain documents in order to respond to Zinus' motion, including
27 but not limited to all documents that refer or relate to the Swirl Wrap process, all photos or videos
28 of the Swirl Wrap process, and all documents that refer or relate to the circumstances relating to

1 the decision to switch from the original Mattress-in-a-Box to the Swirl Wrap product, including
2 the reasons for the decision. In response, on November 8 and 9, Zinus produced 24 pages of
3 documents, 8 pages of which consisted of correspondence between Zinus and Defendants.

4 11. A Case Management Conference in this action was held on December 11, 2007.
5 Pursuant to the Court's directives, that date was also the first day that discovery could be served.

6 12. On January 14, 2008, Zinus filed the instant motion. As of the date the motion
7 was filed, Zinus had not produced any documents other than the November 8 and 9 production.
8 Accordingly, Dreamwell advised Zinus that it needed certain documents in order to respond to
9 Zinus' motion. Dreamwell also asked Zinus to continue the hearing on its motion to give
10 Dreamwell an opportunity to conduct discovery on the issues presented by Zinus' motion.
11 Attached to this Declaration as Exhibit 6 is a true and correct copy of that correspondence.

12 13. In response to this correspondence, Zinus agreed to produce documents and/or
13 things relating to the manufacturing process of the Mattress-in-a-Box product, documents relating
14 to communications between Zinus and Wal-Mart relating to the Mattress-in-a-Box product,
15 Zinus' financial records relating to the manufacture and sale of the Mattress-in-a-Box product,
16 and documents relating to communications between Zinus and defendants. Attached to this
17 Declaration as Exhibit 7 is Zinus' response.

18 14. Although Zinus appeared to indicate that it would be making a significant
19 production of documents, Zinus only produced approximately 220 pages of documents. And that
20 production included only a handful of communications between Zinus and Wal-Mart, most of
21 which related to the lawsuit rather than the Mattress-in-a-Box business, and none of which were
22 dated before Dreamwell sent its May 2007 cease and desist letter. Zinus did not produce its Sales
23 Plan with Wal-Mart, it did not produce the Supply Agreement with Wal-Mart, it did not produce
24 any documentation regarding any product demonstrations or displays, and it did not produce any
25 marketing or promotional materials (including videos), although such documents certainly exist.
26 It also produced no documents relating to the manufacture of the products, other than a few one-
27 page documents that might be manufacturing specifications.
28

1 15. On February 7, 2008, Dreamwell sent another letter to Zinus pointing out the
2 insufficiency of Zinus' production, and asking Zinus to produce at least the following categories
3 of documents: communications between Zinus and Wal-Mart relating to the Mattress-in-a-Box
4 product that have not yet been produced, including any such communications prior to
5 Dreamwell's May 2007 cease and desist letter, the Sales Plan and any communications relating to
6 the Sales Plan, also transactional documents involving Wal-Mart (such as the Supply Agreement),
7 promotional materials and videos created regarding the product, information regarding any Wal-
8 Mart displays of Zinus product, and documents relating to any testing of the Mattress-in-a-Box
9 product showing how quickly it takes for the product to fully reexpand to its uncompressed state,
10 or advertisements or communications with customers or Wal-Mart on the subject. Attached to
11 this Declaration as Exhibit 8 is a true and correct copy of that correspondence.

12 16. On the evening of February 10, Zinus produced another 31 pages of documents,
13 bringing its total production over 250 pages. However, Zinus still has not produced a substantial
14 portion of the documents that might be relevant to this motion, including documents relating to
15 any Wal-Mart sales plan, the Wal-Mart Supply Agreement, promotional materials and videos
16 created regarding the product (including the Wal-Mart Video), any testing showing how quickly
17 the mattress returns to its uncompressed state, and communications with consumers that
18 purchased the product.

19 17. On February 11, 2008, Dreamwell served its initial discovery requests in this
20 action. Attached to this Declaration as Exhibits 9-10 are true and correct copies of those requests.

21 18. Zinus' motion for summary judgment asserts that Zinus did not perform or cause
22 to be performed certain steps of the claims of the patent-in-suit with respect to product that Zinus
23 shipped to Wal-Mart Stores, Inc. A related issue is whether Zinus controlled or directed the
24 activities of persons who performed those steps. While Zinus' motion is dependent at least in part
25 on Zinus' relationship and communications between Zinus and Wal-Mart, and Zinus' relationship
26 and communications with Wal-Mart's customers (who are the end users of the accused Mattress-
27 in-a-Box product), no discovery has been conducted regarding these relationships and
28

1 communications (aside from the limited deposition of Scott Reeves), and very few documents
2 have been produced on these topics.

3 19. In order to fully respond to Zinus' motion, Dreamwell requires basic discovery
4 with respect to Zinus' relationship and communications with Wal-Mart and Wal-Mart's
5 customers. Specifically, Dreamwell requires discovery from Zinus on at least the following
6 topics: (i) any contractual relationships Zinus has with Wal-Mart relating to the accused
7 products; (ii) any Sales Plans or other arrangements between Zinus and Wal-Mart that would
8 involve Wal-Mart displaying the accused products; (iii) any communications between Zinus and
9 Wal-Mart or Wal-Mart's customers that relate to the Mattress-in-a-Box product and how it will
10 be used; (iv) any contractual relationships Zinus has with Wal-Mart's customers relating to the
11 accused products, including any warranty relationships and communications regarding such
12 relationships; (v) any communications between Zinus and Wal-Mart that relate to the Mattress-in-
13 a-Box product and how it will be used, including but not limited to user's manuals and instruction
14 sheets; (vi) any advertising, marketing or promotional materials (including videos) that relate to
15 how the accused product will be unpackaged and/or used. Dreamwell believes that Zinus will
16 have documents in each of these categories. Depending on the nature and extent of discovery that
17 Zinus provides, Dreamwell may need to take similar discovery from Wal-Mart.

18 20. Zinus' motion for summary judgment also asserts that the accused Mattress-in-a-
19 Box product does not gradually expand to its uncompressed state. While Zinus' motion is
20 dependent at least in part on the manner in which Zinus' Mattress-in-a-Box product re-expands,
21 no discovery has been conducted regarding the manner in which the accused product re-expands
22 (aside from the limited deposition of Scott Reeves), and very few documents have been produced
23 on this topic.

24 21. In order to fully respond to Zinus' motion, Dreamwell requires basic discovery
25 with respect to the manner in which or speed at which Zinus' Mattress-in-a-Box re-expands, and
26 any communications regarding this subject. Specifically, Dreamwell requires discovery from
27 Zinus on at least the following topics: (i) any measurement or testing done regarding the manner
28 in which or speed at which the accused products re-expand; (ii) any representations that Zinus has

1 made to Wal-Mart or Wal-Mart's customers regarding the manner in which or speed at which the
2 accused products re-expand, including but not limited to advertising, marketing or promotional
3 materials; (iii) any communications that Zinus has had with Wal-Mart or Wal-Mart's customers
4 regarding the manner in which or speed at which the accused products re-expand, including but
5 not limited direct customer feedback or complaints. Dreamwell believes that Zinus will have
6 documents in each of these categories. Depending on the nature and extent of discovery that
7 Zinus provides, Dreamwell may need to take similar discovery from Wal-Mart.

8 22. Finally, while Zinus' motion for summary judgment purports to be limited to
9 product that Zinus shipped to Wal-Mart Stores, Inc., Zinus has requested relief that would also
10 encompass product that it has removed from its packaging and was not shipped to any third party,
11 as well as product that it has shipped or delivered to entities other than Wal-Mart Stores, Inc.
12 While Zinus' motion in some places purports to cover these activities, no discovery has been
13 conducted regarding these issues (aside from the limited deposition of Scott Reeves), and very
14 few documents have been produced on these topics.

15 23. In order to fully respond to Zinus' motion, Dreamwell requires basic discovery
16 with respect to instances in which Zinus itself has removed Mattress-in-a-Box mattresses from
17 their outer polyethylene "duffel bag" or fabric roll and allowed the mattress to expand, as well as
18 product that it has demonstrated, shipped or delivered to entities other than Wal-Mart Stores, Inc.
19 Specifically, Dreamwell requires discovery from Zinus on at least the following topics: (i) any
20 instances in which Zinus has removed Mattress-in-a-Box mattresses from their outer polyethylene
21 "duffel bag" or fabric roll and allowed the mattress to expand; (ii) any sales or contractual
22 relationships Zinus has with parties other than Wal-Mart Stores, Inc. relating to the accused
23 products; (iii) any communications between Zinus and other entities that relate to the Mattress-in-
24 a-Box product and how it will be used; (iv) any contractual relationships Zinus has with other
25 entities' customers relating to the accused products, including any warranty relationships and
26 communications regarding such relationships; (v) any communications between Zinus and other
27 entities that relate to the Mattress-in-a-Box product and how it will be used, including but not
28 limited to user's manuals and instruction sheets; (vi) any advertising, marketing or promotional

1 materials (including videos) that relate to how the accused product will be unpackaged and/or
2 used. Dreamwell believes that Zinus will have documents in each of these categories. Depending
3 on the nature and extent of discovery that Zinus provides, Dreamwell may need to take similar
4 discovery from third parties who have information regarding the topics set forth above.

5 I declare under penalty of perjury under the laws of the United States of America that the
6 foregoing is true and correct to the best of my knowledge.

7 Executed this 12th day of February, 2008 at San Francisco, California.

8
9
10 /s/
Kenneth B. Wilson